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Appeal of:	:
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INTOWN PROPERTIES, INC.,	: HUDBCA Nos. 95-C-135-C9
95-C-136-C10	: 95-C-137-C11, 95-C-138-C12
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Appellant	:
Contract No. 113-92-812	:
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Melton Harrell, President Intown Properties, Inc. 615 Peachtree Street, Suite 1100 Atlanta, Georgia 30308	For the Appellant
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Bruce M. Kasson, Esq. Office of General Counsel Department of Housing and Urban Development Washington, D.C. 20410	For the Government
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DECISION BY ADMINISTRATIVE JUDGE JEAN S. COOPER

May 31, 1996

Statement of the Case

By letters dated May 19, 1995 and June 16, 1995, Intown Properties, Inc. ("Appellant") filed a notice of appeal with the Board regarding the deemed denial of four claims for payment of close-out invoices which had been submitted to a HUD contracting officer. On June 16, 1995, this Board ordered the contracting officer to issue a final decision on the four claims. On July 19, 1995, the contracting officer issued a final decision, denying most of Appellant's four claims.

Appellant's claims were originally docketed as four separate cases under four separate contracts, and two of Appellant's claims appeared to be eligible to be decided under the accelerated procedure set forth in Board rule 12.1(b). By letter dated June 16, 1995, Appellant elected to proceed under the accelerated procedure for two of its claims. By motion dated August 11, 1995, the Government requested that the appeals be removed from the accelerated procedure, as all four claims arose from a single contract. This Board granted the Government's motion on September 1, 1995.

The parties agreed that an oral hearing was not necessary in this matter, and submitted this case on the written record, which includes a 44-volume appeal file, the parties' briefs, and sworn affidavits.

By letter dated April 22, 1996, Appellant submitted a "Request for a Ruling," amending its claim to include the costs of preparing its close-out invoices, totalling \$75,056.05. This Board does not have the authority to consider Appellant's claim for these invoice preparation costs at this time, because Appellant has not first submitted its claim to the contracting officer for a final decision, a prerequisite to this Board's jurisdiction under the Contract Disputes Act, 41 U.S.C. § 605(a). Consequently, Appellant's claim for the cost of preparing its close-out invoices is dismissed without prejudice for lack of jurisdiction.

### Findings of Fact

1. On August 18, 1992, Appellant entered into Contract No. 113-92-812, an indefinite quantity contract with the U.S. Department of Housing and Urban Development ("HUD" or "Government"), to supply real estate asset management services for the Fort Worth, Texas area. Under the contract, Appellant was required to provide specified services designated to maintain certain HUD-owned properties for eventual sale by HUD. (AF 2.1.)

2. The contract was divided into six geographic regions, and HUD intended to award each geographic region separately. Appellant was awarded four of the six geographic regions: Abilene ("Area 1"), Fort Worth North ("Area 2"), Fort Worth South ("Area 3"), and Tyler ("Area 6"). As stated in Appellant's proposal documents, Appellant intended to establish local offices in each of the awarded areas, and apparently did so. There is nothing in the record to indicate that these offices were used for any other purpose than performance of this contract. (AF 2.1, 4.6, 4.8.)

3. The contract was set to expire on August 31, 1993, but, through a series of modifications, HUD extended the original performance period through March 31, 1994. (AF 2.1 at F-i, 2.7, 2.8, 2.9, 2.10.)

4. Section B of the contract contains the compensation provisions. Section B.2(A), including Note 2, provides, in pertinent part, as follows:

#### B.2 Compensation for Required Services.

A. As full compensation for performance of all service defined in Section C, the contractor shall be paid the following fees (fixed prices) for each HUD-owned property assigned:

This fee is payable in installments. Thirty (30) Percent will be paid at the time HUD receives, reviews, and accepts the acquisition package and the remaining Seventy (70) Percent will be paid when the sale closes.

NOTE 2: In the event properties are not sold when the contract expires or it is partially or fully terminated for the convenience of HUD, the Contractor shall be paid a negotiated amount for documented expenses. Any such partial per property payment shall not exceed the prices stated above.

(AF 2.1.) Modification number 10 set the fixed price per property at \$935 for Area 1, \$1,036 for Area 2, \$994 for Area 3, and \$1,015 for Area 6. (AF 1.1, 2.11.) At the time of contract expiration on March 31, 1994, Appellant had been paid the 30% installment for all properties remaining in its inventory. (AF 3.5.)

4. Appellant submitted a close-out invoice for Area 6, dated May 15, 1994, for unpaid expenses on 21 unsold properties, totalling \$10,609.56. Appellant included in its invoice direct costs, Appellant's Area 6 office expenses allocated among the unsold properties, and a 10% profit. Appellant also subtracted the 30% installment payment that it had already received in calculating the amount of payment due. (AF 3.1.)

5. By letter dated July 12, 1994, the contracting officer directed Appellant to submit further documentation in support of its May 15 invoice. The contracting officer also instructed Appellant to include a reasonable amount for both overhead and profit. (AF 3.4.)

6. On August 10, 1994, Appellant submitted an amended close-out invoice for Area 6, claiming \$19,390.62. In this amended invoice, Appellant invoiced for direct expenses, including the Area 6 office expenses, a corporate overhead rate of 10%, and a profit of 10% of direct expenses. (AF 3.5.)

7. By letter dated September 15, 1994, the contracting officer disallowed Appellant's claims for the Area 6 office expenses, corporate overhead, and profit. The contracting officer also disallowed the costs of inspections performed by Kyle Rhodes, the Area 6 property manager for Appellant, because the contracting officer perceived a conflict of interest in allowing an employee to perform inspections. (AF 3.6.)

8. By letter dated November 15, 1994, Appellant expressed its disagreement with the contracting officer's decision to disallow Appellant's claims for Area 6<sup>1</sup> office expenses, corporate overhead, profit, and the inspections performed by Rhodes. With the November 15 letter, Appellant submitted an amended invoice for Area 6, claiming \$11,552.30. Appellant included the following certification by Martin Pinsky, Appellant's Vice President:

This is to further certify that the claim made for the above amounts dated November 15, 1994 were made in good faith, supporting data are correct and complete and that the amount requested by this contractor reflects the amount believed to be due this contractor.

Again, Appellant claimed direct expenses, including the Area 6 office expenses, a corporate overhead rate of 10%, and a profit of 10% of direct expenses. Appellant's November 15, 1994 submission was not date-stamped by HUD when it was received. However, the contracting officer responded to it by letter dated December 5, 1994. We find that it is likely that the contracting officer received Appellant's amended invoice and certification for Area 6 by not later than November 22, 1994, a week after it was mailed, considering the length and detail of the contracting officer's response, and the fact that the Thanksgiving holiday occurred during that time period. (AF 3.7, 3.8.)

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<sup>1</sup> In Appellant's complaint in this matter, Appellant reduced its Area 6 claim to \$11,393.63, to account for a reduction in the fixed price per property contained in Modification 10. (Complaint, at 16; AF 2.11.)

9. Appellant submitted its close-out invoices, dated February 21, 1995, for all 811 properties remaining in Appellant's inventory in Areas 1, 2, and 3. (AF 3.11.) The invoices were received by the contracting officer on March 1, 1995. (AF 1.1). Appellant claimed \$26,506.17 for Area 1, \$74,672.40 for Area 2, and \$106,632.61 for Area 3. Appellant's President included the following certification in its claim:

This claim is submitted LAW FAR 33.207. I certify that this claim is made in good faith, supporting data are accurate and complete to the best of my knowledge and belief; that amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor.

Appellant used a different method of calculation for its Areas 1, 2 and 3 claims. Appellant's claims included direct expenses, "overhead" expenses which included the local office expenses plus corporate overhead, and profit on both direct and overhead expenses. Appellant claimed a profit rate of 6.5% for Area 1; 12% for Area 2, and 10% for Area 3. Appellant derived these profit rates from its original proposal. Appellant also subtracted the 30% installment payment previously received. (AF 3.11, 3.12.)

10. Appellant has fully documented the expenses incurred in the performance of this contract. This documentation constitutes the majority of the 44-volume appeal file in this case. (AF 3.1, 3.5, 3.7, 3.12, 3.13, and 3.14.)

11. On July 18, 1995, the contracting officer issued a final decision on Appellant's close-out invoices for all four areas. The contracting officer allowed \$8,301.90 for Area 1, \$15,707.00 for Area 2, \$32,256.86 for Area 3, and \$1,788.45 for Area 6. The contracting officer denied Appellant's claims for local office expenses, corporate overhead, and profit. The contracting officer also disallowed \$570 claimed by Appellant for inspections performed by Rhodes. (AF 1.1.)

12. The contract required Appellant to inspect properties on initial listing, inspect completed repairs, and routinely inspect the properties in Appellant's inventory. Appellant first subcontracted with Rhodes to perform these inspections, and later hired Rhodes as the Area 6 property manager. Because of the small inventory in Area 6, both positions were part-time. Rhodes was paid separately for the inspections he performed. (AF 2.1, 3.7 at 37-39, 59-61, 69-71, 103-105, 153-155, 181-183; complaint.)

### Discussion

#### Entitlement Under Note 2

The threshold question to be resolved in this case centers on the interpretation of the language contained in contract Section B.2(A), Note 2, cited in full text above. The parties disagree on the meaning of the term "documented expenses" in Section B.2(A), Note 2. The contract does not define the term.

In his final decision, the contracting officer denied Appellant's claim for local office expenses, corporate overhead, profit, and inspection costs

solely on the basis of entitlement. The contracting officer did not question the quantum of Appellant's claim, or the adequacy of the documentation submitted by Appellant in support of its claim.

Appellant has claimed entitlement to Appellant's local office expenses which were located in the Fort Worth area. These offices were opened specifically for this contract, and there is no indication in the record that these offices were used for any purpose other than for the performance of the contract at issue in this case.

The contracting officer has mistakenly denominated these costs as unallowable indirect costs. The costs associated with the operation of Appellant's local offices are direct costs, as defined by FAR 31.202(a) as follows:

(a) A direct cost is any cost that can be identified specifically with a particular final cost objective. No final cost objective shall have allocated to it as a direct cost any cost, if other costs incurred for the same purpose in like circumstances have been included in any indirect cost pool to be allocated to that or any other final cost objective. Costs identified specifically with the contract are direct costs of the contract and are to be charged directly to the contract. All costs specifically identified with other final cost objectives of the contractor are direct costs of those cost objectives and are not to be charged to the contract directly or indirectly.

Because the costs of Appellant's local offices are directly attributable to the contract at issue, these costs are direct costs of the contract, and Appellant is entitled to recover these costs under Section B.2(A), Note 2 of the contract.

The contracting officer also disallowed Appellant's claim for corporate overhead as an unallowable indirect cost. The Government contends that the term "documented expenses" in Section B.2(A), Note 2 includes only those documented "out-of-pocket" expenses for performance of contract tasks on specific properties, and that it does not include indirect costs, even if they can be documented, because they were not expenses incurred for specific properties, but for the entire contract inventory.

This Board has held that a contractor is entitled to indirect costs, including corporate overhead, under Section B.2(A), Note 2 of the contract. Pearl Properties, HUDBCA No. 95-C-118-C4, 96-1 BCA ¶ 28,219. The contract provisions in Pearl Properties, supra and in this case are identical. In Pearl Properties, supra, we held that Section B.2(A), Note 2, encompasses both direct and indirect costs within the word "expenses." To do otherwise would deprive Appellant of part of its real and actual cost of performance, which includes its indirect costs by definition in the FAR, and would also require us to ignore the express provision in the contract of FAR 52.216-7(b) (ii) (E).

Pearl Properties, supra at 140,905. Similarly, we find that Appellant is entitled to recover its corporate overhead expenses in this case as well.

The contracting officer denied Appellant's claim for profit, because, in his opinion, profit does not constitute "direct expenses" of the contract, and profit is only recoverable from the fixed price portion of the contract.

Under FAR 15.9, the Government and the contractor are to negotiate for a reasonable profit. FAR 15.901(b) contemplates that contractors will be paid a reasonable profit on work performed on public contracts. It states that:

It is in the Government's interest to offer contractors opportunities for financial rewards sufficient to (1) stimulate efficient contract performance, (2) attract the best capabilities of qualified large and small business concerns to Government contracts, and (3) maintain a viable industrial base.

Section B.2(A), Note 2, clearly states that "the Contractor shall be paid a negotiated amount for documented expenses." If documented expenses mean, as the Government contends, only itemized expenditures which are attributable to an individual property, there would be nothing left to negotiate. The contractor would simply present its documentation for the expenses of services performed, and the Government would pay the contractor for those documented expenses.

The Government's interpretation of Section B.2(A), Note 2 as not including profit renders the word "negotiated" meaningless. Under established rules of contract interpretation, an interpretation which gives reasonable meaning to all parts of the instrument will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless, or superfluous. Hol-Gar Manufacturing Corp. v. United States, 169 Ct. Cl. 384, 351 F.2d 972 (1965). A contract must be interpreted and applied so as to give meaning to all of its provisions, and not leave portions of it meaningless. Brantlev' Construction Co., ASBCA No. 43828, 93-1 BCA ¶ 25,370, citing United States v. Johnson Controls, Inc., 713 F.2d 1541 (Fed. Cir. 1983). Negotiating for profit is clearly contemplated by the language of Section B.2(A), Note 2.

Disallowing profit, per se, under Section B.2(A), Note 2, would mean that Appellant had to perform the last month of the contract without making any money at all, receiving one reimbursement for the direct and indirect costs of performance. Appellant should not be penalized by a reduction in profit because 823 properties remained unsold, through no failure of contract performance by Appellant, at contract expiration. It was HUD's duty to sell the properties, not Appellant's. The payment schedule set out in the contract, for all but the last month of performance, was a convenient method of payment, unrelated to actual performance or cost of performance. Section B.2(A), Note 2, changes this convenient two-payment schedule for the last month of the contract only by requiring proof of costs actually incurred for performance.

Furthermore, as this Board observed in Pearl Properties, *supra*, Section B.2(A), Note 2, treats expiration of the contract and a termination for convenience the same. When a contract is terminated for convenience, a contractor is entitled to recover the costs of performance, and a reasonable profit, plus any special costs related to the termination. Carol S. Best, HUDBCA No. 82-693-C17, 85-1 BCA ¶ 17,712. We conclude that it is appropriate to pay Appellant a reasonable profit on its costs of performance, up to the fixed price per property allowable under the terms of the contract, as modified.

In calculating its claim, Appellant has subtracted the 30% payment that it already received for each property, thus accounting for any profit previously paid. In addition, because Section B.2(A), Note 2, limits Appellant's recovery to the fixed price per property, Appellant could not receive a greater profit than it would have received if the properties had been sold during the life of

the contract, and the Government had paid Appellant the remaining 70% installment due under Section B.2(A).

For these reasons, Appellant is entitled to recover profit for expenses incurred on properties remaining in its inventory at contract expiration under Section B.2(A), Note 2 of the contract.

#### Entitlement to the Costs of Inspections Performed by Kyle Rhodes

The contracting officer also disallowed \$570 for inspections performed in Area 6 by Rhodes. The contracting officer does not dispute that the services were required under the contract, and that the costs for the services were incurred by Appellant. Furthermore, the contracting officer does not dispute the amount claimed, the allocability, or reasonableness of these expenses. Instead, the contracting officer denied the claim on the ground that allowing Appellant's employee to perform inspections of Appellant's work created an alleged conflict of interest, citing HUD Acquisition Regulation 2452.209-72, which was incorporated by reference into the contract. HUDAR 2452.209-72 (April 1984) states as follows:

##### Organizational Conflicts of Interest

(a) The Contractor warrants that to the best of its knowledge and belief and except as otherwise disclosed, he or she does not have any organizational conflict of interest which is defined as a situation in which the nature of work under a Government contract and a Contractor's organizational, financial, contractual or other interests are such that:

(1) Award of the contract may result in an unfair competitive advantage; or

(2) The Contractor's objectivity in performing the contract work may be impaired.

(b) The Contractor agrees that if after award he or she discovers an organizational conflict of interest with respect to this contract, he or she shall make an immediate and full disclosure in writing to the Contracting Officer which shall include a description of the action which the Contractor has taken or intends to take to eliminate or neutralize the conflict.

The Government may, however, terminate the contract for the convenience of the Government if it would be in the best interest of the Government.

(c) In the event the contractor was aware of an organizational conflict of interest before the award of this contract and intentionally did not disclose the conflict to the Contracting Officer, the Government may terminate the contract for default.

(d) The provisions of this clause shall be included in all subcontracts and consulting agreements wherein the work to be performed is similar to the service provided

by the prime contractor. The Contractor shall include in such subcontracts and consulting agreements any necessary provisions to eliminate or neutralize conflicts of interest.

48 C.F.R. S 2452.209-72. The contracting officer also stated that any inspections performed by Rhodes were done in his capacity as property manager, and therefore, Rhodes should have been compensated for those inspections by his salary, which was included in the fixed price per property.

We find that the contracting officer's conclusions on this issue are flawed. The contract required Appellant to have work inspected, but it did not specify whether Appellant or a subcontractor should perform the inspections. We see no conflict in Appellant hiring as an employee one of its subcontractors to perform different tasks under the circumstances presented here. It would not appear that Appellant had any unfair competitive advantage in the award of the contract, particularly because Rhodes was initially brought in by Appellant as a subcontractor to do the inspections. He was later hired by Appellant to be the part-time property manager for Area 6. Even if we accept as true the Government's contention that Appellant violated the contract clause cited by the contracting officer, the remedies for violation set forth in the clause do not provide for summary disallowance of claimed expenses.

The contracting officer also stated that Rhodes should not be compensated separately for the inspections because he was performing these inspections in his capacity as property manager. Due to the small inventory of Area 6, both positions were part-time positions, and Appellant compensated Rhodes accordingly. This Board sees nothing improper in compensating Rhodes separately for the inspections that he was performing as a part-time inspection subcontractor.

Furthermore, the Government has submitted no legal argument in support of its theory that Appellant is not entitled to recover the costs of inspections performed by Rhodes. Where a party does not submit a legal argument in support of its position, that party is deemed to have waived that issue. *Dungaree Realty, Inc. v. United States*, 17 F.3d 1444 (1994). For all of these reasons, Appellant is entitled to the cost of inspections performed by Rhodes.

### **Quantum**

The Government has not challenged the quantum calculations made, or the profit rates claimed, by Appellant. Appellant shall be paid for all direct expenses, including the costs of operating its local offices and the costs of inspections performed by Rhodes, indirect expenses, and profit at the rates claimed by Appellant. Appellant's recovery shall not exceed the fixed price per property stated in Modification number 10.

Under Section 12 of the Contract Disputes Act, 41 U.S.C. § 611, a contractor is entitled to interest on the contractor's claim. The parties disagree on the date from which interest should begin to accrue. The Government contends that interest should accrue on Appellant's invoices for all four areas from March 1, 1995, the date on which the contracting officer received Appellant's invoices for Areas 1, 2, and 3. The Government bases its contention on a previous ruling in this case in which this Board held that the four invoices were a single claim for purposes of determining the amount in dispute, as well as for hearing. At that time, we did not rule on whether the invoices constituted a single claim for purposes of computing interest under the Contract Disputes Act. The Contract Disputes Act does not require that all claims under

a contract be filed at one time for purposes of computing when interest begins to run under the Act. Claims are filed as they accrue and are ready for filing. We see no reason to post-date Appellant's claim for Area 6 merely because its claims for Areas 1, 2, and 3 were filed later. Appellant contends that, because it submitted the invoices for Area 6 and Areas 1, 2, and 3 at different times, interest should accrue on its Area 6 invoice from August 10, 1994, the date of Appellant's first amended invoice for Area 6, and that interest should accrue on Appellant's Areas 1, 2 and 3 invoices from February 21, 1995, the date of those invoices.

FAR 33.201 defines an invoice that is not in dispute when submitted as a routine request for payment. A contractor must convert that invoice to a claim by written notice to the contracting officer. Certification of an invoice, in accordance with FAR 33.207, is sufficient to convert a routine invoice to a claim, so long as the requirements of FAR 33.201 are also met (i.e., the invoice is disputed as to liability or amount, or is not acted upon by the contracting officer in a reasonable time). Pearl Properties, supra.

When Appellant submitted its August 10, 1994 invoice for Area 6, it was not yet in dispute. After the contracting officer disallowed portions of Appellant's August 10 invoice, Appellant submitted a certified invoice for Area 6, dated November 15, 1994, that was received no later than November 22, 1994. At that time, Appellant's Area 6 invoice was clearly in dispute, and its certification complied with the requirements of the Contract Disputes Act and the FAR. Appellant is entitled to interest on its Area 6 invoice from November 22, 1994. Appellant submitted certified invoices for Areas 1, 2, and 3, dated February 21, 1995, that were received by the contracting officer on March 1, 1995. Because the invoices for Areas 1, 2, and 3 involved the same contested issues as the Area 6 invoice, the invoices for Areas 1, 2, and 3 were in dispute when submitted, and were not routine submissions, as defined at FAR 33.201. Appellant is entitled to interest on those invoices from March 1, 1995, the date on which they were received. 41 U.S.C. section 611.

#### Conclusion

For the foregoing reasons, the appeal is granted, excepting Appellant's recent claim for the preparation of its close-out invoices which has not been submitted to the contracting officer.

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Jean S. Cooper  
Administrative Judge

Concur:

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David T. Anderson  
Administrative Judge

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Lynn J. Bush  
Administrative Judge

Date: May 31, 1996